IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7504 OF 2006

Gafarkhan Hamidkhan Pathan ...Petitioner

vs.

Savitribai Shankarrao Igave ...Respondents

Mr.I.M.Khairdi for the Petitioner
Mr.R.S.Alange for the Respondents

CORAM: A.S.OKA,J.
DATE : FEBRUARY 5,2007.

P.C.:

1. Rule. The Advocate for the Respondent waives service. Considering the facts and circumstances of the case, the Petition is taken up for hearing forthwith.

2. The Petitioner is an Appellant in an Appeal preferred before the District Court. By a Judgment and Order dated 7th September 2006 which is impugned in this Petition under Article 227 of Constitution of India, the Applications made by the Petitioner at Exh.26 and Exh.27 were rejected.

3. Application at Exh.26 is for seeking permission to add additional ground in the Memorandum of Appeal. Application at Exh.27 is for an amendment of a ground which is already incorporated in the Memorandum of Appeal. Both the Applications have been rejected on the ground that similar amendment was sought in the written statement and the Application for amendment has been rejected.

4. Rule 2 of Order XLI of the Code of Civil Procedure,1908 reads thus :

. Rule 2. Grounds which may be taken in appeal-

. The appellant shall not, except by leave of the Court, urge or be heard in support any ground of objection not set forth in the memorandum of appeal; but the Appellate Court, in deciding the appeal, shall not be confined to the grounds of objections set forth in the memorandum of appeal or taken by leave of the Court under this rule:

. Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has had a sufficient opportunity of contesting the case on that ground.

5. In view of the aforesaid provision, the Petitioner is entitled to urge a ground with the leave of the court which is not incorporated in the Appeal. The Appellate Court ought to have allowed the Applications made by the Petitioner. Whether the Petitioner is entitled to urge the grounds which are sought to be added or the ground which is sought to be amended is an altogether different matter and it will be considered by

the Appellate Court at the time of the hearing of the Appeal. Rejection of Application for amendment of the written statement is no ground to deny permission to amend the Memorandum of Appeal. Therefore, both the applications ought to have been allowed. Therefore, the Petition must succeed.

6. Hence, I pass the following order :

i) Subject to what is stated above, impugned orders are quashed and set aside and the Applications at Exh.26 and 27 are hereby allowed.

ii) Amendment to be carried out within a period of four weeks from the date of production of authenticated copy of this order before the Appellate Court.

iii) The Appellate Court will hear and decide the Appeal expeditiously.

iv) All contentions of the parties on merits of the Appeal are kept open.

JUDGE